

(1981) 08 AHC CK 0029
In the Allahabad High Court
Case No : Second Appeal No. 124 of 1975

Nizamuddin

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-1981

Acts Referred:

Railways Act, 1890 — Section 73, 76

Citation : AIR 1981 All 444

Hon'ble Judges : A.N. Varma, J

Bench : Single Bench

Advocate : K.N. Tripathi, for the Appellant;

Final Decision : Allowed

Judgement

A.N. Varma, J.—This is a plaintiff's second appeal which arises out of a suit for recovery of Rs. 6,607/-. The trial court decreed the suit. On appeal, the lower appellate court has dismissed the same. Hence, this second appeal.

2. Shortly stated, the plaint case was that the plaintiff had booked a consignment of 186 bags of Biri leaves on 10-8-1969 at Duddhinagar Railway Station on the Eastern Railway for being carried, and delivered to the consignee at Varanasi on the Northern Railway. Due to negligence, misconduct and wrongful withholding and detention and other acts of the defendant Railways, the consignment did not arrive at Varanasi within the normal expected period of 10 days. The plaintiff presented the Railway receipt at the destination station from time to time, but was informed that the goods had not reached. It was on 8-6-70 that the plaintiff was informed that the goods had arrived at Varanasi on 26-3-1970. When the plaintiff went to take delivery of the goods, he found the consignment was lying in an uncared for state and in a damaged condition. It was also short in weight. Consequently, the plaintiff asked for an "open delivery" or what is technically called "assessment delivery" free from wharfage. The concerned officers at Varanasi refused to allow "open delivery". The plaintiff, consequently, wrote to the Chief Commercial Superintendent for appropriate orders. Correspondence

ensued between the plaintiff and the Railway authorities but the plaintiff was not given "open delivery". Subsequently, it transpired that the consignment was disposed of by the Railway authorities by public auction, which they had a right to do under the Rules. The plaintiff was, therefore, entitled to claim damages on account of non-delivery of the goods as well as on account of the loss or damage caused to the goods as a result of the various acts of negligence and misconduct of the Railway administration in handling the consignment.

3. The plaintiff consequently served a statutory notice on the Railway administration asking for being compensated for the loss but without any avail. Hence the suit.

4. The defence of the Railway administration was that it had not committed any act of negligence or misconduct in regard to the consignment. It was the plaintiff who was to be blamed for any loss or deterioration as the plaintiff unjustifiably insisted for "open delivery" to which he was not entitled in law. The plaintiff should have taken open delivery and if he found that any loss or damage had been caused, he could claim to be reimbursed or compensated. Not having taken delivery of the consignment when offered, the plaintiff was not entitled to any decree.

5. On the pleadings of the parties, various issues were framed by the trial court. It held that the Railway administration was guilty of negligence and misconduct. There was a substantial unexplained delay in carrying the consignment and that the Railway administration was also at fault and unjustified in refusing to give "open delivery" to the plaintiff. The Railway administration was, therefore, liable for short delivery as well as for the loss caused to the plaintiff in consequence to the negligence and misconduct of the Railway administration. The suit of the plaintiff-appellant was consequently decreed.

6. Aggrieved by the decree passed by the trial court, the Railway administration filed an appeal. The appellate court disagreed with the trial on the question whether or not, the Railway administration was bound to give "open or assessment delivery." It held, analysing the various relevant statutory provisions and, the authorities on the subject, that the plaintiff was not justified or entitled to ask for open delivery, and that neither was the Railway administration bound to give such delivery to the plaintiff-appellant. It further found that in any case, the plaintiff failed to prove that any damage was caused to the consignment at any time subsequently to the arrival of the consignment at Varanasi or after the Railway administration had refused to allow "open delivery." From these findings, the lower appellate court concluded that the plaintiff was not entitled to any decree. The suit of the plaintiff-appellant was consequently dismissed. It might be mentioned at this point that the lower appellate court did not go into the further question whether or not any damage had been caused to the consignment in transit or after the goods had been delivered to the Railway for being carried to the destination station. The lower appellate court concluded that as a matter of law, the plaintiff having failed to take "open delivery" he could not

sue the Railway administration for any loss or deterioration due to misconduct or negligence of the Railway administration.

7. Learned counsel for the petitioner first made a feeble attempt to question the correctness of the view expressed by this Court in various decisions to the effect that a consignee has no legal right to insist on "open delivery" and that neither is the Railway administration bound to allow "open or assessment delivery". However, he was unable to satisfy me that the view consistently taken by this Court on this subject requires reconsideration.

8. Apart from the decisions which have been referred to by the lower appellate court, in AIR 1978 All 79, one of the recent cases, a Division Bench of this Court had occasion to consider this precise controversy. Upon an examination of the relevant statutory provision and the various authorities, both of this court and of other courts, the Division Bench held that it is not open to a consignor or consignee to refuse to take delivery and to insist on reweighment and "open delivery" even if it is indicated that there has been pilferage or a part of the consignment had been lost or damaged in transit. It was held in this case that the Railway administration was not bound to grant "open delivery" unless there was something in the contract itself (See Gopi Nath and Sons v. Union of India AIR 1978 All 79). The view taken by the lower appellate court on the legal controversy being supported by settled view of this Court is accepted as correct.

9. The next submission of the learned counsel for the plaintiff-appellant was that even if it is assumed that the plaintiff was not entitled to insist on "open delivery", the lower appellate court should still have gone into the question whether or not on the evidence on record, it was established that the consignment had suffered damage in transit. Learned counsel contended that if the plaintiff had no right to insist on open delivery, all that could be said that the plaintiff is that he would not be entitled to claim damages for the loss which might have been caused to the goods for the period after the same had been offered to the plaintiff by the Railway administration, and that the defendant in that case might also be liable for wharfage or damage under the relevant statutory rules. However, the fact that the plaintiff was not justified in asking for "open delivery" could not absolve the Railway administration from the liability which might already have arisen if it is found that the consignment was damaged or lost as a result of negligence or misconduct of the Railway administration while the goods were in transit or prior to the offer made by the Railway administration to the plaintiff-respondent.

10. Having heard learned counsel for the parties, I find that the above contention of the learned counsel for the plaintiff-appellant is correct. The fact that the Railway administration was not bound to give either, "open delivery" or that the plaintiff was not justified in asking for the same, could not dispose of the other basis of the claim of the plaintiff-appellant namely that the Railway administration was liable for the loss or damage caused to the goods while the goods were in transit or before they were offered for delivery. The trial court had

recorded a clear finding on this issue and held that loss or damage had been caused to the goods on account of the negligence and misconduct of the Railway administration in carrying the goods from the station of origin to Varanasi. The lower appellate court, ought, therefore, to have gone into this question and recorded a finding whether or not the plaintiff was entitled to any decree on the ground that the loss had been caused to him, even before the consignment was offered to the plaintiff.

11. Learned counsel for the defendant-respondent vehemently contended that the plaintiff-appellant having failed to take delivery of the goods, was not entitled to sue for damages. If the plaintiff was interested in recovering the amount of loss suffered by him as a result, of any alleged negligence or misconduct of the Railway administration, he should have taken delivery of the consignment and then sued for damages. In support, learned counsel for the Railway administration cited three decisions reported in Governor-General in Council Vs. Firm Badri Das Gauri Dutt, .

12. I have examined these three decisions, but I do not find that they support the broad contention raised by the learned counsel for the defendant-respondent. It is true that in those decisions, it has been observed that the plaintiff should take delivery of the goods and should not insist on "open delivery" and then only could the plaintiff claim damages. But these observations have to be read in the context. In each of these cases, the claim of the plaintiff was that the goods had suffered deterioration also after the plaintiff had asked for open delivery of the consignment and the same was refused by the Railway administration. In some of these cases, there was also a finding that damage had been caused to the goods after the plaintiff had been refused "open delivery". But it was only on the premise that the plaintiff was not entitled to ask for "open delivery" and that the Railway administration was not bound to give "open delivery", that it was held that the plaintiff could not claim damages as he was himself at fault and was instrumental in the loss or damage caused to the consignment by reason of his unlawful insistence on taking "open delivery". It was in this perspective that the aforesaid observations were made by learned Judge.

13. In my opinion, there is no warrant either in the statute or in any principle for holding that just because the plaintiff refused to take "open delivery", it must follow as a matter of law, that he became disentitled to claim even those damages which might have resulted from the negligence and misconduct of the Railway administration even prior to the offer of the consignment upon arrival at the destination station. The fact, therefore, that the plaintiff was not right in asking for "open delivery" could not ipso facto result in the dismissal of the claim of the plaintiff-respondent in its entirety.

14. Learned counsel next contended that where the plaintiff refuses to take delivery, it would be impossible to assess the damages caused to the consignment. I cannot accept this as a rule of universal application. It would depend on the evidence available in each case. Where it is possible to ascertain

the damages even where the plaintiff refused to take "open delivery", I see no bar to awarding damages, provided, of course, there is material on the record.

15. The lower appellate court will therefore find out whether any damage or loss was caused to the consignment by any negligence or misconduct of the Railway administration even prior to the offer of the goods to the plaintiff-respondent, and if so, whether the plaintiff has succeeded in proving the quantum of damages. Of course, if the evidence on the record is not sufficient to entitle the plaintiff to a decree on that basis, his claim will be liable to be rejected on that ground.

16. I make it clear that in view of the fact that I have affirmed the decision of the lower appellate court that the plaintiff was not justified in refusing to take delivery, and in insisting on taking open delivery, the plaintiff would be liable for wharfage or demurrage etc., and that the same would be liable to be adjusted against the claim of the plaintiff, if any.

17. In the result, the appeal succeeds and is allowed. The judgment and decree of the lower appellate court are set aside. The case is remanded to the lower appellate court for being disposed of according to law having regard to the observations made in this judgment.

18. The parties shall bear their own costs of this appeal.